Case No. 19-60616

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, CLC, LOCAL UNIONS 605 AND 985,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

ON PETITION FOR REVIEW OF DECISION AND ORDER BY THE NATIONAL LABOR RELATIONS BOARD

ORIGINAL BRIEF OF INTERVENOR ENTERGY MISSISSIPPI, LLC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Lucas Aubrey of Sherman, Dunn, Cohen, Leifer & Yellig, P.C., counsel for the Petitioner in this appeal, the International Brotherhood of Electrical Workers, AFL-CIO, CLC, Local Unions 605 and 985.
2. Benjamin Banta of Entergy Services, LLC, counsel for the Intervenor in this appeal, Entergy Mississippi, LLC. Entergy Services, LLC is an indirect

subsidiary of Entergy Corporation and is an affiliate of Entergy Mississippi, LLC.

3. Entergy Corporation, which is the ultimate parent corporation of Entergy Mississippi, LLC, which, in turn, is the Intervenor in this appeal.

4. Entergy Mississippi, LLC, the Intervenor in this appeal.

5. David Habenstreit, counsel for the Respondent in this appeal, the National Labor Relations Board.

6. Joel Heller, counsel for the Respondent in this appeal, the National Labor Relations Board.

7. International Brotherhood of Electrical Workers, AFL-CIO, CLC, Local Unions 605 and 985, the Petitioner in this appeal.

8. Amy McIntire of Chaffe McCall, L.L.P., counsel for the Intervenor in this appeal, Entergy Mississippi, LLC.

9. Kathleen McKinney, Regional Director of Region 15 of the Respondent in this appeal, the National Labor Relations Board.

10. Sarah Voorhies Myers of Chaffe McCall, L.L.P., counsel for the Intervenor in this appeal, Entergy Mississippi, LLC.

11. National Labor Relations Board, the Respondent in this appeal.

12. Jonathan Newman of Sherman, Dunn, Cohen, Leifer & Yellig, P.C., counsel for the Petitioner in this appeal, the International Brotherhood of Electrical Workers, AFL-CIO, CLC, Local Unions 605 and 985.

13. Roxanne Rothschild, counsel for the Respondent in this appeal, the National Labor Relations Board.

14. Bart Sheard of Sherman, Dunn, Cohen, Leifer & Yellig, P.C., counsel for the Petitioner in this appeal, the International Brotherhood of Electrical Workers, AFL-CIO, CLC, Local Unions 605 and 985.

15. Sherman, Dunn, Cohen, Leifer & Yellig, P.C., counsel for the Petitioner in this appeal, the International Brotherhood of Electrical Workers, AFL-CIO, CLC, Local Unions 605 and 985.

16. Kira Dellinger Vol, counsel for the Respondent in this appeal, the National Labor Relations Board.

/s/ Sarah V. Myers
Attorney of Record for Intervenor

STATEMENT REGARDING ORAL ARGUMENT

This case is more than 15 years old. Significant time and resources have been spent, and there has been too much delay at various stages. Only a single issue remains, and that single issue—which has been previously addressed by this Court upon briefs and oral argument and which is not complex—can be, and has been, readily addressed in the parties' briefs. Oral argument would not aid the decisional process (especially in light of the undisputed standard of review, with deference owed to the National Labor Relations Board), would only further delay the disposition of this case, and would be an inefficient use of the Court's and the parties' time and resources.

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STATEMENT REGARDING JURISDICTION

Pursuant to 29 U.S.C. § 160(f) (2019), this Court has jurisdiction over the petition for review filed by the International Brotherhood of Electrical Workers, AFL-CIO, CLC, Local Unions 605 and 985 ("the Union").

STATEMENT OF THE ISSUES

(1) Whether, under the deferential "substantial evidence" standard of review, the National Labor Relations Board correctly determined that Dispatchers exercise "independent judgment" when assigning field employees to places, thereby making them supervisors under the National Labor Relations Act.

(2) Whether the Court can consider the Union's newfound argument that Dispatchers do not "assign" field employees to a "place," since this was beyond the scope of the Court's original remand order to the Board.

(3) Whether, by failing to raise the issue before the Board, the Union has waived its newfound argument that Dispatchers do not "assign" field employees to a "place."

STATEMENT OF THE CASE

A. Course of Proceedings and Procedural History.

This matter has a long and detailed procedural history spanning more than 16 years. In 2003, Entergy Mississippi, Inc. ("EMI"[1]) filed a unit-clarification petition, seeking to remove transmission and distribution dispatchers ("Dispatchers") from a pre-existing bargaining unit (which was represented by the Union) because the Dispatchers were supervisors, not employees.[2] After conducting a hearing, the Acting Director for Region 15 of the National Labor Relations Board (the "N.L.R.B." or "Board") found that Dispatchers were employees, not supervisors, pursuant to the National Labor Relations Act ("NLRA").[3] EMI thereafter filed a timely Request for Review with the N.L.R.B., and on September 30, 2006, the Board remanded the matter back to Region 15 for further consideration in light of the Board's then-recent decision in *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006).[4]

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[1] On November 30, 2018, EMI undertook a restructuring that resulted in the transfer of substantially all of the assets and operations of EMI to a new entity, Entergy Mississippi, LLC. Thus, although EMI was the employer during the relevant time period, the proper party name of the Intervenor in this appeal is Entergy Mississippi, LLC.

[2] ROA.1554.

[3] ROA.3402-3515.

[4] ROA.3067.

Following a supplemental hearing, the Region issued a supplemental order and decision finding that the Dispatchers were employees, not supervisors.[5] EMI again petitioned for review, and after considering the case for almost five years, the Board issued a decision on December 30, 2011, affirming the Region's decision that Dispatchers were employees.[6] On August 14, 2012, in response to the General Counsel's motion for summary judgment, the Board issued its decision and order in *Entergy Mississippi, Inc.*, 358 N.L.R.B. 908, ordering EMI to return the Dispatchers to the bargaining unit and, upon request, bargain with the Union regarding the Dispatchers.[7]

EMI subsequently petitioned this Court on August 15, 2012, for review of the Board's decision.[8] Also at issue in that appeal was whether the N.L.R.B. had the requisite quorum of members during the agency proceeding.[9] Following briefing, this Court stayed the then-pending appeal because the Constitutional quorum issue was pending before the Supreme Court in *NLRB v. Noel Canning*, 570 U.S. 916.[10] Following the Supreme Court's decision that the Board lacked a quorum at various

[5] ROA.4031-65.
[6] ROA.4872-83.
[7] ROA.4963-67.
[8] Case No. 12-60644, Doc. 00511958288, Petition for Review of an Order of the National Labor Relations Board filed by Entergy Mississippi, Inc., dated August 15, 2012.
[9] Case No. 12-60644, Doc. 00512126977, pp. 58-67.
[10] Case No. 12-60644, Doc. 00512381073, Order dated September 20, 2013.

times, this Court granted the Board's motion to vacate and remanded the matter back to the Board.[11] On October 31, 2014, the Board again concluded that Dispatchers were employees.[12] EMI petitioned this Court for review of the Board's decision, and the N.L.R.B. filed a cross-application for enforcement of the Board's decision.[13]

After briefing and argument by the parties, this Court issued its original opinion on December 7, 2015, and a revised opinion on March 3, 2016.[14] In its opinion, the Court found substantial evidence to support the Board's determination that Dispatchers do not "responsibly direct" field employees or "assign" them to a "time" or "significant overall duty." *Entergy Mississippi, Inc. v. NLRB*, 810 F.3d 287, 295 (5th Cir. 2015) (*Entergy II*). But the Court held that the Board ignored certain evidence and "vacate[d] the Board's decision that dispatchers do not exercise 'independent judgment' when assigning employees to locations and remand[ed] for further proceedings on this narrow question." *Id.* at 298.

After the matter was remanded to the Board, both EMI and the Union submitted position statements to the Board.[15] On March 21, 2019, the Board held that Dispatchers were statutory supervisors:

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[11] Case No. 12-60644, Doc. 00512720101, *Per Curiam* Order of Court dated August 1, 2014.
[12] ROA.4969-74.
[13] Case No. 14-60796, Doc. 00512865964, Cross-Application for Enforcement of an Order of the National Labor Relations Board dated December 8, 2014.
[14] Case No. 14-60796, Doc. 00513404668, Court Opinion dated March 3, 2016.
[15] ROA.4979-5037.

> [T]he dispatchers undisputedly assign employees to places, and these places are selected based on the exercise of independent judgment because dispatchers prioritize outages free from the control of others, prioritization decisions entail discerning and company data, and these decisions are not dictated or controlled by detailed instructions.

367 N.L.R.B. No. 109 at *14 (2019). On April 25, 2019, the Union filed a petition for review with the U.S. Court of Appeals for the District of Columbia Circuit, and EMI subsequently filed a motion to intervene as well as a motion to transfer the appeal to this Court.[16] The D.C. Circuit granted EMI's motions and transferred the appeal to this Court on or around August 21, 2019.[17]

At all relevant times, EMI has maintained—and continues to maintain—that Dispatchers are supervisors pursuant to the NLRA and, thus, EMI cannot be compelled to bargain with the Union over the terms and conditions of the Dispatchers' employment.

B. Statement of Facts.

Entergy Corporation ("Entergy"), EMI's ultimate parent company, operates power utilities that provide electricity throughout portions of the Southeastern United States. Due to utility regulation and the evolution of its business, Entergy is organized into several affiliated companies or subsidiaries located in Mississippi (EMI), Texas, Arkansas, and Louisiana. (ROA.36, 2628-31, 2975.) While

[16] Case No. 19-1092, Docs. 1784812, 1788639, 1791927.
[17] Case No. 19-1092, Doc. 1802939.

constituting separate corporate entities, these subsidiaries operate as an integrated electrical system with common management, procedures, and resources (including personnel such as Dispatchers). (ROA.2920-24, 2970, 2974-77.)

For this reason, Dispatchers at all of Entergy's subsidiaries and affiliates perform the same duties, have the same responsibilities, and are subject to the same terms and conditions of employment. (*Id.*) Indeed, all of Entergy's Dispatchers use the same computers, equipment, software, and Switching, Tagging and Clearance Procedures, and have the same authority to assign and responsibly direct Field Employees. (ROA.2918-27, 2973-91.) But only Dispatchers at EMI have yet to be finally and definitively removed from a union-represented bargaining unit pursuant to Board processes. (ROA.2581-85, 2629-31.)

Dispatchers at EMI (and throughout Entergy) are responsible for not only managing the transmission and distribution of power throughout the electrical system, but also for ensuring that power outages are minimized in occurrence and duration.[18] (ROA.219; 2581, 2802-03.) These responsibilities are exceedingly important because unscheduled outages can affect the health and safety of EMI's customers and employees, as well as EMI's profits.[19] (ROA.1654-55, 2836-37,

[18] The term "Dispatcher" as used herein encompasses all utility-industry employees who manage the transmission and distribution of power, as well as its restoration.
[19] The rates EMI is permitted to recover are directly tied to its ability to minimize unscheduled power losses and to efficiently restore power. (ROA.2608-12, 2689-

2936-38, 2993-94, 3012-13, 3356-66.) Dispatchers manage the restoration of power by monitoring and supervising the electrical system, controlling and directing planned outages, and reacting to issues of "trouble"[20] to minimize unplanned outages. (ROA.219, 1128, 2622.) They accomplish the latter two responsibilities by assigning Field Employees to particular outages and then directing them through the switching process.[21] (ROA.1278, 2622, 3012-16, 3036-39.) Switching is the act of opening or closing switches located throughout Entergy's electrical transmission and distribution system with the purpose of directing, redirecting, and isolating power feeds. (ROA.2659, 4872.)

To accomplish these responsibilities, Dispatchers exercise significant supervisory control and assign field employees to locations, particularly during multiple outage situations. (ROA.188-90, 789-803, 2622.) Initially, the Dispatcher determines to which location or outage the field employee should respond (since there typically are numerous trouble situations at any given time), how many field employees should respond to the respective trouble (a determination that requires

93, 3115, 3182-90.)

[20] "Trouble" refers to any situation that has caused an outage or otherwise disturbed the proper transmission of power, and encompasses technical issues within a substation or other EMI equipment, a disturbance caused by weather, or even a car hitting a pole. (ROA.43, 790, 2790.)

[21] "Field employees" generically references various classifications of bargaining-unit employees who are assigned by Dispatchers, including linemen, crewmen, troublemen, switchmen, and substation employees. (ROA.43-47.)

the Dispatcher's assessment of the number of customers affected by the problem, the location of the field employees, the weather, the types of customers, and the potential for other trouble), and the types of field employees to assign to any given trouble situation. (ROA.789-829, 1129, 1829-30, 2719, 2789-94.) In making these assignments, the Dispatcher can use existing resources or call additional field employees to work as needed. (*Id.*; *see also* ROA.2823.) Thereafter, the field employees are completely within the control of the Dispatcher, who will assign and route them as necessary. (ROA.2963-64, 3013-15, 3024.) Dispatchers may further assign a field employee to a different work area, including those outside his or her normal network area. (ROA.1129-36, 2963-64, 3013-3029, 3036-39.) The field employee is not released from duty until signed out by the Dispatcher. (ROA.2706-08, 2794, 2963.)

As will be addressed *infra,* Section III, Dispatchers use their own judgment and weigh numerous discretionary factors when assigning field employees to locations of trouble. For example, a Dispatcher must consider the amount of time needed for each repair, the difficulty of the repair, the location of the outage, the availability and location of field employees, as well as the types of customers affected, in determining which field employees to assign to which locations. (ROA.1131-32; *see also* ROA.789-794, 2789-90, 2793-95.) Dispatchers must also consider whether a trouble situation should be addressed first; whether several

trouble situations can be dealt with simultaneously; whether a crew currently working on a problem should be reassigned to a different, more critical trouble situation; and whether the Dispatcher should call out additional personnel. (ROA.2825-27, 3028-29, 3032-35.) In these situations, a Dispatcher does not just receive a notice via an alarm and assign the field employee already working in the area to that one situation; rather, a Dispatcher receives innumerable alarms and has to make judgments regarding which alarms to address and, importantly, how to best use the available resources to do so. (*Id; see also* ROA.1128-36, 2822-27.)

SUMMARY OF ARGUMENT

The sole issue properly before this Court is whether the Board erred in finding that Dispatchers exercise "independent judgment" when assigning field employees to a place. Although the Union argues that this Court also should consider whether Dispatchers "assign" field employees to a "place," the Court should not consider this newfound argument for two independent reasons. First, the parties in *Entergy II* previously conceded "assignment" to a "place," and this issue was neither in dispute before the *Entergy II* Court nor part of the remand to the Board. Moreover, the Union never raised this argument before the Board on remand, instead assuming that "assignment" to a "place" was satisfied. Thus, the Union's new argument should not now be considered by the Court for the first time in this second appeal.

On the sole issue properly before this Court—whether the Board erred in finding that Dispatchers exercise "independent judgment" when assigning field employees to a place—the Board's findings should be affirmed based on substantial evidence coupled with the controlling, deferential standard of review. Moreover, the Union's two main arguments should be rejected.

First, the Union argues that the Board failed to explain how Dispatchers exercise independent judgment when "prioritizing multiple outages," since prioritizing multiple outages is not one of the twelve supervisory functions listed in Section 2(11) of the NLRA. But the Board addressed this issue explicitly and cited record evidence showing that Dispatchers use their own judgment and consider innumerable factors (*i.e.*, the type of customer affected, whether an outage is likely to cause damage to EMI's property, current and future weather conditions, whether a repair may be faster and safer at any particular time, risks posed by potential new outages, etc.) when assigning field employees to locations during multiple outage situations. Indeed, Dispatchers make these decisions without the aid of any standard operating procedures, guidelines, computer systems, or documents.

Second, the Union argues that the Board erred in finding that Dispatchers exercise "independent judgment" because the Board ignored evidence that Dispatchers do not assess the individual skills of field employees when exercising such judgment. However, the Board did not "ignore" such evidence. Rather, the

Board squarely confronted this evidence and held that Dispatchers exercise "independent judgment" even absent individual skill-assessment. Although the Union disagrees with this interpretation of "independent judgment," *Chevron* deference requires that any reasonably defensible interpretation be upheld. Here, the Board's interpretation is not only defensible but is consistent with controlling law, which has not interpreted "independent judgment" to necessarily include a sub-requirement that a decision-maker assess the individual skills of employees. This Court should, therefore, reject the Union's request to have this Court become seemingly the first-and-only authority to interpret "independent judgment" to necessarily include a sub-requirement that a decision-maker, across all contexts, also assess the individual skills of employees in order to be deemed a statutory supervisor.

In sum, under the deferential "substantial evidence" standard of review, the Board did not err in finding that Dispatchers exercise independent judgment when assigning field employees to places, thereby making them supervisors pursuant to Section 2(11) of the NLRA.

ARGUMENT

I. The law of the case requires that this Court apply a deferential standard of review to the Board's determination that Dispatchers are supervisors.

A. Standard of Review.

This Court has previously articulated the deferential standard of review that governs this appeal:

> We accord *Chevron* deference to the Board's reasonable interpretations of ambiguous provisions in the NLRA. *See NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984)). We will affirm the Board's legal conclusions "if they have a reasonable basis in the law and are not inconsistent with the Act." *Valmont Indus. v. NLRB*, 244 F.3d 454, 464 (5th Cir. 2001).
>
> We will affirm the Board's factual conclusions if they are "reasonable and supported by substantial evidence on the record considered as a whole." *J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 450 (5th Cir. 2003)(quoting *Valmont*, 244 F.3d at 463). "Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. It is more than a mere scintilla, and less than a preponderance." *El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 656 (5th Cir. 2012) (emphasis omitted) (quoting *Spellman v. Shalala*, 1 F.3d 357, 360 (5th Cir. 1993)). "In determining whether the Board's factual findings are supported by the record, we do not make credibility determinations or reweigh the evidence." *NLRB v. Allied Aviation Fueling of Dall. LP*, 490 F.3d 374, 378 (5th Cir. 2007). And "[r]ecognizing the Board's expertise in labor law, [we] will defer to plausible inferences it draws from the evidence, even if we might reach a contrary result were we deciding the case *de novo*." *Valmont*, 244 F.3d at 463 (quoting *NLRB v. Thermon Heat Tracing Servs., Inc.*, 143 F.3d 181, 185 (5th Cir. 1998)).
>
> "Whether an employee is a supervisor is a question of fact." *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203, 208 (5th Cir. 2001). "Because of the 'infinite and subtle gradations of authority' within a company, courts normally extend particular deference to N.L.R.B. determinations that a position is supervisory." *Id*. (quoting *Monotech of Miss. v. NLRB*, 876 F.2d 514, 516 (5th Cir. 1989)).

Entergy II, 810 F.3d at 292. The above standard is the law of the case and is undisputed by the Union. Notably, under that standard, "the possibility of drawing

two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 523 (1981) (quoting *Consolo v. FMC*, 383 U.S. 607, 620 (1966)).

B. Supervisory Status Under the NLRA.

At issue in this case is whether the Dispatchers at EMI are "supervisors" pursuant to Section 2(11) of the NLRA. That section sets forth 12 supervisory functions and defines a "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, *assign*, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (2019) (emphasis added). The Supreme Court has interpreted Section 2(11) as setting forth a three-part test:

> Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held 'in the interest of the employer."

NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 713 (2001) (quoting *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 573-74 (1994)).[22] The presence of *any one* of the 12 listed criteria may establish supervisory status, and the actual exercise of the indicia of supervisory status is irrelevant, so long as the authority exists. *See Monotech of Miss. v. NLRB*, 876 F.2d 514, 517 (5th Cir. 1989). EMI, as "[t]he party alleging supervisory status[,] bears the burden of proving that it exists by a preponderance of the evidence." *Entergy II*, 810 F.3d at 295 (citing *Oakwood*, 348 N.L.R.B. at 694.

II. The sole issue properly before this Court is whether the Board erred in finding that Dispatchers exercise "independent judgment" when assigning employees to a place.

As a preliminary matter, the parties dispute the scope of the issues properly before this Court for review. In its Brief, the Union asserts that this Court should review the Board's findings on three issues: (1) whether Dispatchers "assign" field employees to a "place,"[23] (2) whether such assignments require the exercise of "independent judgment" when Dispatchers prioritize multiple outages,[24] and (3) whether such assignments require the exercise of "independent judgment" regardless of whether Dispatchers assess the skills of individual field employees

[22] That Dispatchers' authority is held in the interest of the employer is not now, and has never been, in dispute.
[23] Petitioner's Brief, at p. 16-23.
[24] Petitioner's Brief, at p. 24-28.

prior to making a decision.[25] EMI disagrees. The first issue above, raised for the first time ever in this second appeal, should not be considered by this Court for the following two separate and independent reasons.

A. The sole issue remanded by the Fifth Circuit to the Board was whether Dispatchers exercise "independent judgment" when assigning employees to places.

The simple issue of whether Dispatchers "assign" employees to a "place"—irrespective of whether such assignment is with or without independent judgment—was never properly before the Board on remand. A review of the Court's *Entergy II* opinion speaks for itself in this regard.

When the parties previously came before this Court in *Entergy II*, the Court examined several, alternative grounds upon which Dispatchers could be classified as "supervisors" under Section 2(11). Namely, the Court considered whether Dispatchers are supervisors because they "responsibly direct" employees using "independent judgment"; (2) "assign" employees to a "time" (*i.e.*, hold them over to perform an overtime assignment) using "independent judgment"; (3) "assign" employees to "significant overall duties" using "independent judgment"; or (4) "assign" employees to a "place" using "independent judgment." 810 F.3d at 295-99. The Court affirmed the Board's findings of a lack of supervisory status as to each

[25] Petitioner's Brief, at p. 28-32.

category except one: Dispatchers' use of independent judgment in the assignment of field employees to a place.

On this issue, this Court examined the entire record and found "[t]he Board ignored significant portions of the record that show how [d]ispatchers arguably exercise independent judgment when deciding how to allocate Entergy's field workers." *Id*. at 297. The Court highlighted numerous portions of the record that suggested Dispatchers utilize their own discretion and exercise "independent judgment" when assigning field employees to a place or outage. *Id*. at 297-98. Accordingly, the Court remanded a single, "narrow question" back to the Board:

> [W]e vacate the Board's decision that dispatchers do not exercise "independent judgment" when assigning employees to locations and remand for further proceedings on this narrow question.

Id. at 298. In reaching this holding, the Court repeatedly referenced Dispatchers' ability to assign field employees to various locations or "places." For instance, the Court observed that "[a]fter a dispatcher has sent a field employee to one location, he has authority to redirect that person to another case of trouble." *Id*. at 297. Similarly, the Court noted that "at times, a dispatcher may have to decide whether to send his one crew to a trouble location with the most customers on it, to the one that's got the hospital out, or to the plastics plant that needs to be picked up." *Id*. Indeed, the parties in the *Entergy II* proceeding even conceded "assignment" to a

"place," and this issue was neither in dispute before the *Entergy II* Court nor part of the remand to the Board.[26]

In an effort to expand the scope of the Court's limited remand, the Union notes that in the conclusion the Court in *Entergy II* states: "[w]e VACATE the Board's determination that dispatchers do not 'assign' field employees to 'places' through the exercise of 'independent judgment' and we REMAND for further proceedings[.]" *Id*. at 299. But the scope of remand cannot be determined by

[26] The parties all conceded "assignment" to a "place" in their briefing. *See* Case No. 14-60796, Doc. 00512978895 (EMI Brief), p. 49 ("And though the Board concluded that the Dispatchers assigned Field Employees to a place, the Board claimed that this assignment lacked independent judgment."); Doc. 00513015370 (NLRB Brief), p. 24 ("[S]ubstantial evidence supports the Board's finding that while dispatchers assign employees to a place, they do not do so using independent judgment."); Doc. 00513024770 (Union Brief), p. 48 ("The Board found that, even assuming that the dispatchers' temporary assignment of field employees to a trouble location is 2(11) "assignment," it does not meet the definition of supervisory assignment because the dispatchers do not use independent judgment when assigning field employees to these locations.). At oral argument, no party contested that Dispatchers do not "assign" employees to a "place." *See* Oral Argument for Case No. 14-60796, available at http://www.ca5.uscourts.gov/oral-argument-information/oral-argument-recordings. This argument should not be considered for the first time on this second appeal. *Lindquist v. City of Pasadena*, 669 F.3d 225, 239-40 (5th Cir. 2012) ("[T]he waiver doctrine is a consequence of a party's inaction and holds that an issue that could have been but was not raised on appeal is forfeited and may not be revisited by the district court on remand. The doctrine also prevents us from considering such an issue during a second appeal.") (internal quotations and citations omitted); *Bayou Steel Corp. v. Nat'l Union Fire Ins. Co.*, 487 F. App'x 933, 936 (5th Cir. 2012) ("The waiver doctrine holds that an issue that could have been but was not raised on appeal is forfeited and may not be revisited by the district court on remand. . . [and] serves judicial economy by forcing parties to raise issues whose resolution might spare the court and parties later rounds of remands and appeals[.]") (internal quotations and citations omitted).

reading this single sentence in a vacuum. A review of the *entire* opinion, particularly the Court's analysis concerning assignment to a place using independent judgment, is the best evidence that the Court's remand order was limited to the "narrow question" of whether Dispatchers exercise "independent judgment" when assigning field employees to a place. *Carter v. Mitchell*, 829 F.3d 455, 463 (6th Cir. 2016) ("The scope of a remand is determined by examining the entire order or opinion, to determine whether and how the court of appeals intended to limit a remand," and "individual paragraphs and sentences must not be read out of context.") (internal quotations omitted); *Energy Mgmt. Corp. v. City of Shreveport*, 467 F.3d 471, 476 (5th Cir. 2006) ("On a second appeal following remand, the only issue for consideration is whether the court below reached its final decree in due pursuance of [this court's] previous opinion and mandate.") (internal quotations omitted).

For this reason, in addition to the waiver under Section 10(e) of the NLRA, this Court should not consider the issue of whether Dispatchers "assign" field employees to a "place."

B. Section 10(e) of the NLRA bars judicial review of whether Dispatchers "assign" employees to a "place."

The Court also should not consider the Union's newfound "assignment" argument for another wholly independent reason. Specifically, regardless of the scope of the remand, the Union cannot raise arguments on appeal that were not first presented to the Board. Although the Union argues on appeal that Dispatchers do

not "assign" field employees to a "place" because field employees are allegedly sent to locations within a "pre-assigned" area and such pre-assignments are made without the requisite authority,[27] this argument was never raised to the Board. Rather, before the Board, the Union assumed "assignment" to a "place" and focused solely on whether such assignments were done with the requisite "independent judgment."[28] The plain language of the NLRA, as well as the controlling precedent, bar the Union from raising this "pre-assignment" argument for the first time on appeal to this Court.

The limits of this Court's review of an agency order are not boundless. Rather, Section 10(e) of the NLRA bars an appellate court from reviewing an issue or argument that was not raised before the Board:

> No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

29 U.S.C. § 160(e) (2019); *see also* 29 U.S.C. § 160(f) (2019) ("Upon the filing of such petition [for review of a final order of the Board], the court shall proceed in the

[27] Petitioner's Brief, at p. 20. This argument is further contradicted by the record evidence, which shows that Dispatchers assign field employees to locations outside their normally assigned areas. *See infra*, Section IV, pp. 48-53.
[28] ROA.4979-94.

same manner as in the case of an application by the Board under subsection (e) of this section.").[29]

The Supreme Court has strictly construed Section 10(e) to bar judicial review of any issue or argument not asserted by a party before the Board. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). In *Woelke*, the Board addressed an argument *sua sponte* that had not been raised or argued by either party, and the Court of Appeals subsequently reviewed and affirmed the Board's ruling on this issue. *Id.* When the petitioner sought review of the Court of Appeals' ruling, the Supreme Court held that the Court of Appeals lacked jurisdiction to consider the argument under section 10(e):

> [T]he Court of Appeals was without jurisdiction to consider that question. The issue was not raised during the proceedings before the Board, either by the General Counsel or by Woelke. Thus, judicial review is barred by § 10(e) of the Act, 29 U.S.C. § 160(e) . . . . Because the Court of Appeals lacks jurisdiction to review objections that were not urged before the Board, we do not reach the question whether the picketing was lawful. Instead, we vacate that portion of the Court of Appeals' judgment that relates to this issue[.]

[29] While the Union's petition for review of the Board's order was necessarily filed pursuant to Section 10(f), the standards and procedures of Section 10(e) govern such petitions. *Swinick v. NLRB*, 528 F.2d 796, 800 n.8 (3d Cir. 1975) ("[T]he procedures set forth in section 10(e) are assimilated into section 10(f)."); *see also Creative Vision Res., L.L.C. v. NLRB*, 882 F.3d 510, 528 (5th Cir. 2018); *Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1396 (5th Cir. 1983); *A. H. Belo Corp. v. NLRB*, 411 F.2d 959, 967 (5th Cir. 1969).

Id. Importantly, to preserve the argument for judicial appeal under Section 10(e), the Supreme Court noted that the petitioner "could have objected to the Board's decision in a petition for reconsideration or rehearing" and its "failure to do so prevents consideration of the question by the courts." *Id*. at 666.

The Fifth Circuit has similarly strictly construed Section 10(e) to bar appeal of any argument not raised before the Board. *See Creative Vision Res., L.L.C. v. NLRB*, 882 F.3d 510, 528 (5th Cir. 2018) (holding that petitioner had failed to timely raise an argument before the Board and "our review of any such argument is barred. See 29 U.S.C. § 160(e)"); *Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1396-97 (5th Cir. 1983) (holding that "the company's attempt to argue that *First National Maintenance* [] established that it had no duty to bargain" was barred by Section 10(e) because of "the company's failure to raise the *First National Maintenance* issue before the Board"); *NLRB v. McEver Eng'g, Inc*., 784 F.2d 634, 643 (5th Cir. 1986) ("We find that because the issue was not raised during the proceedings before the Board and because the Board expressly did not consider the issue, judicial review is barred by section 10(e) of the Act."); *Nix v. NLRB*, 418 F.2d 1001, 1009 (5th Cir. 1969) (holding that petitioner's argument "was not raised before the Board, and thus section 10(e) [] precludes it from being raised before this Court.").[30]

[30] Waiver of arguments not previously raised is not limited to appeals of NLRB orders under Sections 10(e) and (f). *Horton v. Bank One, N.A.*, 387 F.3d 426, 435

The record herein establishes that the Union never argued or otherwise raised to the Board the issue that Dispatchers do not "assign" employees to a "place." In its briefing to the Board, the Union *assumed* that Dispatchers "assign" employees to a "place" and, instead, requested *only* that the Board consider whether Dispatchers use "independent judgment" when making such assignments. (ROA.4981-82, 4992-93.) In focusing solely on "independent judgment," the Union repeatedly "arguably" assumed—without presentation of any substantive arguments or evidence—"assignment" to a "place":

> Consequently, the Board should clarify on remand that, because the dispatchers do not assess the skills of the employees that they arguably assign to a place, but instead follow the employer's instructions as to which employee to send, they do not use the requisite independent judgment in assigning field employees that would render them supervisors. ROA.4981. (emphasis added).
>
> * * *
>
> As explained in the following section, the "something more" that is needed to render an assignment supervisory, is that the alleged supervisor use independent judgment in matching the skills of the employee it assigns to the work, or in this case, the place where the work is to be done, with the skills needed for the work. ROA.4983. (emphasis added).
>
> * * *

(5th Cir. 2004) ("Arguments not raised in the district court cannot be asserted for the first time on appeal.") (quoting *In re Liljeberg Enters., Inc.*, 304 F.3d 410, 427 n.29 (5th Cir. 2002)); *Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999) ("The Court will not allow a party to raise an issue for the first time on appeal merely because a party believes that he might prevail if given the opportunity to try a case again on a different theory.") (citing *Forbush v. J.C. Penney Co.*, 98 F.3d 817, 822 (5th Cir. 1996).

> [F]or any assignment, including a temporary assignment to a place, to be supervisory, the putative supervisor has to use independent judgment in deciding which employees to assign. ROA.4984. (emphasis added).
>
> * * *
>
> [F]ield employees the dispatchers send to trouble locations after hours are selected according to company procedures, and not according to the dispatchers' assessment of their skills. ROA.4990. (emphasis added).
>
> * * *
>
> [T]he Board's ruling that Entergy's dispatchers do not use independent judgment when arguably "assigning" a field employee to a place, is based on substantial evidence. ROA.4993. (emphasis added).

Indeed, a review of the Union's entire Statement of Position to the Board firmly evidences that the Union never argued clearly or with sufficient conviction or precision that Dispatchers do not "assign" field employees to a "place."[31] ROA.4979-94.

Moreover, even after the Board issued its decision, the Union again failed to raise to the Board any argument that Dispatchers do not "assign" field employees to a "place." The Union did not move for reconsideration or rehearing or file any supplemental briefing making any "do not make assignments" or "pre-assignments"

[31] EMI's briefing and arguments to the Board likewise focused on whether Dispatchers exercise "independent judgment" when assigning field employees to locations, as the issue of "assignment" to a "place" was not in dispute. ROA.5010-11 ("The Dispatchers indisputably assign employees to locations, and when doing so, they indisputably act in EMI's interest; indeed, this is not contested by the Board. The sole issue remaining in this litigation is whether Dispatchers also use independent judgment when assigning employees to locations, thus qualifying as 2(11) supervisors.").

argument to the Board. Such inaction only reaffirms that Section 10(e) bars this argument on appeal. *Woelke*, 456 U.S. at 666 (applying Section 10(e) where Petitioner "could have objected to the Board's decision in a petition for reconsideration or rehearing" and asserted its newly-raised argument, but that its "failure to do so prevents consideration of the question by the courts"); *Gulf States*, 704 F.2d at 1396 (applying Section 10(e) where Petitioner could have asserted its argument that the law changed in either supplemental objections or a motion for reconsideration of the Board's decision, but failed to so).

To the extent that the Union may argue that the issue of "do not make assignments" was adequately presented to the Board through its arguments on "independent judgment" or because the Union stated on remand to the Board, without explanation or argument, that Dispatchers "arguably" make assignments, the Fifth Circuit has rejected similar efforts. For example, in *Gulf States*, the Board found that the Petitioner had violated Section 8(a)(5) and (1) of the NLRA by refusing to bargain over layoffs. 704 F.2d at 1395. Before the Board, the petitioner argued that the layoffs were not subject to bargaining because the Union had waived its right to bargain and, further, that the parties had bargained to impasse. *Id.* at 1396. On appeal, the petitioner maintained that the layoffs were not subject to bargaining and asserted that a then-recent Supreme Court case, *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), further established that it had no

duty to bargain over the layoffs. *Id.* The Fifth Circuit rejected the latter argument under Section 10(e), however, because the petitioner never raised it in a supplemental filing to the Board. *Id*. at 1396. In an attempt to get around Section 10(e), the petitioner argued that, although its *First National Maintenance* theory was not explicitly laid out, the overall issue was "adequately presented" and "argued" to the Board. *Id*. The Fifth Circuit disagreed: "[W]e do not think that anything less than a presentation to the Board of the *First National Maintenance* theory itself would have been sufficient to give the Board the opportunity to make the initial exploration of the issues that is the goal of section 10(e)." *Id*. at 1397; *see also Pac Tell Grp., Inc. v. NLRB*, No. 15-1111, 15-1186, 2015 U.S. App. LEXIS 22544, at *10 n.5 (4th Cir. Dec. 23, 2015) (holding that Section 10(e) barred review of the newly-raised argument that employees were supervisors because they possessed the authority to reward as they could grant overtime hours to employees—even though other supervisory assignment and authority arguments had been asserted before the Board).

Because the Union never adequately raised its "do not make assignments" argument before the Board, Section 10(e) bars judicial review unless the Union can establish that its failure should be excused due to "extraordinary circumstances." The Union has offered no reason for its failure—let alone a reason rising to the level of "extraordinary." *Creative Vision Res.*, 882 F.3d at 528 ("Creative does not now

argue . . . that it has shown extraordinary circumstances. Such arguments are forfeited.") (internal citations omitted). Regardless, the burden to establish "extraordinary circumstances" is incredibly high, and little may satisfy the standard, short of an intervening and substantial change in controlling law occurring *after* an appeal is lodged. *Gulf States*, 704 F.2d at 1396 (holding that a Supreme Court decision overruling previously controlling law and issued after arguments to the Board, but before the appeal was lodged, did not qualify as "extraordinary circumstances" under Section 10(e) because the petitioner could have filed supplemental objections to the Board or a motion for reconsideration of the Board's decision).

The Union has not and cannot make any such showing. Accordingly, the plain language of Section 10(e) bars judicial review of the Union's argument that Dispatchers do not "assign" field employees to a "place."

III. The Board did not err in finding that Dispatchers exercise "independent judgment" when assigning field employees to a place.

The sole issue properly before this Court is whether the Board erred in finding that Dispatchers exercise "independent judgment" when assigning employees to a place. On this issue, the Union makes two arguments. First, the Union argues that the Board ignored evidence and failed to explain how Dispatchers exercise

independent judgment when "prioritizing multiple outages."[32] Second, the Union argues that the Board ignored evidence showing that Dispatchers do not "assess the skills" of field employees when assigning them to locations, which purportedly precludes a finding of independent judgment.[33] Both arguments are fatally undermined by controlling law and record evidence.

A. The Board did not err in finding that Dispatchers exercise "independent judgment" when assigning employees to places, by prioritizing multiple outages.

In its first argument concerning "independent judgment," the Union claims that the Board failed to explain how Dispatchers exercise independent judgment when "prioritizing multiple outages," since prioritizing multiple outages is not one of the twelve supervisory functions listed in Section 2(11).[34] But the Board already considered this argument from the Union and explained its findings in response:

> [W]e find that the dispatchers use independent judgment in assigning employees to places by prioritizing outages, determining how many employees should be sent to address a given outage, and deciding to reassign field employees or hold them over from their regular shift or to summon additional on-call employees to work. As the court emphasized, in cases of multiple trouble spots, dispatchers decide whether issues can be dealt with sequentially or must be dealt with simultaneously. In making such decisions, dispatchers may decide to divert a crew from one trouble spot to another or to postpone any response.

[32] Petitioner's Brief, at p. 24-28.
[33] Petitioner's Brief, at p. 28-32.
[34] Petitioner's Brief, at p. 24.

> Dispatchers consider a range of factors when prioritizing outages, including whether a priority customer is affected, the location of the trouble spots, whether additional trouble is likely to occur, current and future weather conditions, and whether a particular outage is likely to cause damage to the Respondent's property. There are no standard operating procedures or rules for dispatchers to follow when prioritizing outages; rather, dispatchers rely on their training and knowledge to best respond to outages as they occur. Additionally, dispatchers may decide that a field employee can complete a quick repair on the way to a larger outage affecting a high-priority client. The broad discretionary authority possessed by the dispatchers in making prioritization decisions is coextensive with their discretionary reassignment of employees to perform unplanned repairs. In sum, the dispatchers make complex decisions regarding prioritization of outages and the number of employees to dispatch to effect repairs based on their own judgment, guided by a wide range of discretionary factors.
>
> *Critically, the dispatchers' decisions regarding outage prioritization and reassigning field employees necessarily result in the dispatchers sending particular field employees to particular places in multiple outage situations. Indeed, it is the dispatchers' exercise of independent judgment that determines the places to which field employees will be sent.* That being the case, the *Oakwood Healthcare* standard has been met: the dispatchers undisputedly assign employees to places, and these places are selected based on the exercise of independent judgment because dispatchers prioritize outages free from the control of others, prioritization decisions entail discerning and comparing data, and these decisions are not dictated or controlled by detailed instructions. *See Oakwood Healthcare, supra*, 348 N.L.R.B. at 693.

Entergy Miss., Inc., 367 N.L.R.B. No. 109 at *12-14 (emphasis added). In reaching this finding, the Board explicitly acknowledged that "prioritizing multiple outages" is not one of the twelve supervisory functions listed in Section 2(11), but cited to the controlling *Oakwood* standard and explained that Dispatchers nonetheless use

independent judgment when "assigning" field employees to "places" during multiple outage situations:

> The Unions correctly note that "allocation of resources and prioritization of outages" are not supervisory indicia set forth in Sec. 2(11). We are not, however, finding that prioritization of outages by itself establishes the dispatchers' supervisory authority. Instead, we find that, based on the facts of this case, the prioritization of multiple outages establishes that the dispatchers exercise independent judgment in assigning employees to places.

Id. at *14 n.7.[35] Such reliance on controlling law and on-point analysis by the Board is very different than the arbitrary decision-making applied in the cases cited by the Union.[36] *Penrod v. NLRB*, 203 F.3d 41, 46 (D.C. Cir. 2000) (finding a lack of reasoned decision-making because the Board erroneously cited a case "as though the case dealt with the same type of disclosure" issue that was before the Board); *MacMillan Publ'g Co. v. NLRB*, 194 F.3d 165, 167-68 (D.C. Cir. 1999) (finding a lack of reasoned decision-making where N.L.R.B.'s Regional Director "cited none

[35] The Union's argument suggests that employees cannot be putative supervisors if an activity they perform (*i.e*., prioritizing multiple outages) is not verbatim described as one of the twelve supervisory functions of Section 2(11) (*i.e*., assign). But courts and the Board have contemplated and found supervisory status involving activities not verbatim described as one of the twelve supervisory functions. *See, e.g., Squires Lumber Co*., 2016 N.L.R.B. LEXIS 375 (May 24, 2016) (unpublished), *adopting* 2016 N.L.R.B. LEXIS 271, at *18 (Apr. 8, 2016); *Pub. Serv. Co. v. NLRB*, 271 F.3d 1213, 1216 (10th Cir. 2001). Some courts have even used "prioritization" interchangeably with "assignment." *NLRB v. Dole Fresh Vegetables, Inc*., 334 F.3d 478, 486 (6th Cir. 2003) (examining whether employees are supervisors with "authority to prioritize or assign").

[36] Petitioner's Brief, at p. 24.

of the authorities[,]" "Regional Director's first sentence [in the analysis] is inscrutable[,]" "Regional Director's second sentence therefore makes no sense[,]" and Regional Director did not adjudicate an entire objection).

In addition to (erroneously) claiming that the Board failed to explain its reasoning, the Union also argues that the Board failed to consider certain evidence regarding multiple outages. However, the Board stated that it "carefully considered" the entire record,[37] and the Board is not required to specifically address every aspect of the record or distinguish every case and argument asserted by the Union.[38] *Giles v. Astrue*, 433 Fed. App'x 241, 251 (5th Cir. 2011) (unpublished) ("Giles has noted several occasions where the administrative law judge did not thoroughly address each aspect of the record. Yet when dealing with such an extensive and multi-faceted record, there will always be some evidence that is not specifically discussed in the Commissioner's decision. Our review is limited to examining whether the decision to deny benefits is supported by substantial evidence in the record, and it is here."); *see also Securus Techs., Inc. v. Glob. Tel*Link Corp.*, 685 Fed. App'x 979, 986 (Fed. Cir. 2017) ("The operative question is whether the Board has articulated a reasoned explanation for its conclusion of unpatentability that is supported by substantial evidence. Also, the Board is not require[d] . . . to address every argument raised by

[37] Entergy Miss., Inc. , 367 N.L.R.B. No. 109, *4 n.3.
[38] The Union has failed to cite any case suggesting otherwise. Petitioner's Brief, at p. 27-28.

a party or explain every possible reason supporting its conclusion.") (internal quotations omitted); *NLRB v. Guardian Armored Assets, LLC*, 201 Fed. App'x 298, 303 (6th Cir. 2006) ("[T]he N.L.R.B. is not required to discuss every instance in which it has encountered similar facts and to detail how it distinguishes those cases from the one presently before it, lest it be found to have abused its discretion.").

There is ample evidence, both referenced by the Board and in the record, showing that Dispatchers use their own judgment and consider innumerable factors when assigning employees to places in multiple outage situations. The Board cited many factors that Dispatchers consider, including but not limited to whether a priority customer is affected, the location of the trouble spots, whether additional trouble is likely to occur, current and future weather conditions, whether a particular outage is likely to cause damage to EMI's property, whether a field employee can complete a quick repair on the way to a larger outage affecting a high-priority client, whether a certain repair will be "faster and safer" at a particular time, whether an un-repaired outage from the previous day elevates the risk posed by a new outage, the number of customers affected, the types of customers affected, and which customers to prioritize. *Entergy Miss., Inc.*, 367 N.L.R.B. No. 109, at *7-14. As noted by the Board, there are no operating procedures, rules, or guidelines for such decisions and, instead, Dispatchers must consider "a wide range of discretionary

factors" and rely on their experience and training[39] to make "complex decisions." *Id.* at *13-14.

The Board's findings also are supported by substantial record evidence. For example, in multiple outage situations, a Dispatcher must consider the amount of time needed for each repair, the difficulty of the repair, the location of the outage, the availability and location of field employees, as well as the types of customers affected, in determining which field employees to assign to which locations. (ROA.1131-32; *see also* ROA.789-794, 2789-90, 2793-95.) In these situations, a Dispatcher does not just receive a notice via an alarm and assign the field employee already working in the area to that one place with an issue; rather, a Dispatcher receives innumerable alarms and must make judgments regarding which locations to address and, importantly, how to best use available resources to do so. (*Id; see also* ROA.1128-36, 2822-27.) This is particularly true given that Dispatchers operate in a dynamic environment with numerous unplanned contingencies in several different locations (often as a result of weather issues). (ROA.1129-36, 2796-98, 3013-29.) The choices that Dispatchers must make in these situations are complex and include which trouble situation should be addressed first; whether several trouble situations can be dealt with simultaneously; whether a crew currently

[39] To the extent the Union suggests that judgments informed by training cannot be "independent," this argument has been rejected by courts. *See, e.g., Multimedia KSDK, Inc. v. NLRB*, 303 F.3d 896, 899-900 (8th Cir. 2002).

working on a problem should be reassigned to a different, more critical trouble situation; and whether the Dispatcher should call out additional personnel. (ROA.2825-27, 3028-29, 3032-35.)

Dispatchers may also use their judgment to prioritize outages affecting industrial customers that have major accounts or special contracts with Entergy. (ROA.345, 1407.) But if an outage occurs at night or on a holiday when an industrial customer's factory was not operating, Dispatchers may use their judgment to instead prioritize another customer. (ROA.2929-30.) Dispatchers also may prioritize outages affecting customers with "special medical needs," along with prioritizing outages that affect large numbers of residential customers. (ROA.796-97, 1407, 2824, 2836.) In contrast, if an outage is such that few or no customers are affected, a Dispatcher may "make[] a judgment call to leave it as is until the next day." (ROA.363.) Moreover, a Dispatcher may have to decide whether to send "[his] one crew" to a trouble location "with the most customers on it," to "the one that's got the hospital out," or to "the plastics plant that needs to be picked up." (ROA.798-99.) Similarly, Dispatchers may also consider whether a particular outage is likely to cause damage to Entergy equipment. (ROA.2743-44, 2937-38, 2960.) And where, for example, an unrepaired outage from the previous day elevates the risk posed by a new outage, the Dispatcher may reprioritize this assignment for a field employee. (ROA.188-190, 484-85.)

The verbatim testimony of numerous witnesses is perhaps the best evidence of the Dispatchers' use of independent judgment in multiple outage situations. Albert May, the Union's own business manager,[40] testified that, when there are multiple outages, Dispatchers "decide which trouble to handle first" and have the authority to "prioritize how the various cases of trouble would be addressed." (ROA.1131.) After a Dispatcher has sent a Field Employee to one location, he "ha[s] authority to redirect that person to another case of trouble." (*Id*.) A Dispatcher must also "decide how many troublemen or servicemen [are] necessary to handle . . . multiple cases of trouble." (ROA.1136.) Mr. May admitted to the complexity of Dispatchers' judgments in making these assignments:

> Q: And if there is more trouble than that one troubleman or serviceman can handle, then [a Dispatcher] would call out—he would decide to call out additional troublemen or servicemen?
>
> A: Yes.
>
> Q: And do you know what enters into [a Dispatcher's] decision making in those cases?
>
> A: I have to have a—I mean, I'd have to give a hypothetical. I am sure he uses a lot of information to make his decision from.

[40] The *Entergy II* Court characterized the Union's business manager's testimony as "significant." 810 F.3d at 297. Pursuant to established Board principle and precedent, the Union's business manager's testimony should be deemed especially significant and credible, since his testimony is against union interests. *Connecticut Health Care Partners*, 325 N.L.R.B. 351, 354 & 354 n.6 (1998) (crediting the significant testimony of a witness who was "testifying against her own self-interest, and this factor is supportive of her credibility").

(ROA.1131-32.)

Another witness, DOC Supervisor Thomas Fabre, recounted a multiple outage situation where a Dispatcher had to decide whether to prioritize power to certain residential customers or to a chemical plant. (ROA.2929-30.) This decision was made by the Dispatcher alone, without any direction from EMI:

> A: [The Dispatcher] made the decision to leave the plant in the dark while he picked up what customers he could. We ended up having a wrap meeting on it after that, and it was decided that was the correct action—in fact, I told him that night he did what was right, because he did get into a call that night with the major accounts and the plant manager. So he made that decision on his own, and it was right, and that industrial customer ended up staying out seven, eight hours, I believe.

(ROA.2930.) While the chemical plant was "very unhappy" with the Dispatcher's decision and complained to its accounts representative, it was later confirmed that the Dispatcher had exercised good judgment. (ROA.2929-30.)

Likewise, EMI's Manager of Distribution Dispatchers, John Scott, testified to the judgments that Dispatchers may make during multiple outages:

> Q: All right. And how does the dispatcher direct them from one case of trouble to another?
>
> A: By doing so based on the decisions he's making about which case needs to be addressed next.
>
> Q: And does he make judgments as to which ones to redirect to –
>
> A: Yes.
>
> Q: -- a new case of trouble?

> A: Yes. Sometimes that's constantly changing, depending on the situation he's observing with all the information he has to have to analyze. It may be he thinks, I've got this – this is going to be my next case, my next case, and in a matter of a couple of minutes, the situation's changed, and he's got to pull them off of cases he's already sent them on and move them somewhere else, based on the information that he has in his hand.

(ROA.2794-95.) Each outage is different, and while the EMI System identifies major accounts and individuals with health issues, the System does not tell the Dispatcher how to prioritize those situations. (ROA.2660.) Rather, the Dispatcher must "draw on his technical expertise and experience in prioritizing those cases." (ROA.2826.)

EMI's Distribution Operations Director, Michael Vaughn, similarly testified that Dispatchers exercise judgment when assigning employees in multiple outage situations:

> A: [O]nce I have [Field Employees] out, now the determination's [sic] going to fall to the dispatcher's judgment as to where to direct those, how to assign those individuals. Do I want to use a Troubleman as a first responder? Do I want to divert a crew as a first responder? Or do I want to make the decision to call out additional resources? Or do I want to hold these trouble cases until that individual frees up?
>
> * * *
>
> A: [W]hen there's a trouble case or multiple trouble cases that need to be managed, the dispatchers decide that they need to call out one of Howard Wooten's craft employees and utilize them in the restoration of that trouble. . . . And in the case of they already have access of that employee, so they've already called them out, they're the ones that's making the judgments or the decisions on what to send him on next[.] (ROA.151, 189-90.)

Likewise, EMI's Resource Manager, Allen East, testified that during multiple outages, a Dispatcher must make judgment calls:

> A: He may have that one guy and feel like he needs to get to that other nursing home, get those lights back on, and he makes another call to a fellow, hey I got a break—I got a big recloser out on the other side of town, I need to you [sic] go ahead and catch it, I'm going to get on the nursing home with this fellow.
>
> Q: Now these are all—who's making these judgments?
>
> A: This is the Dispatcher.

(ROA.793-94.)

Contrary to the Union's allegation that Dispatchers make decisions according to some "pre-determined" guidance or set of instructions,[41] Dispatchers make these decisions on their own and without the aid of any standard operating procedures, guidelines, or documents. As the Union's own business manager confirmed, there is not "any document—memorandum of understanding document, letter to employees in the dispatching office, any of those kinds of things—that deals with how many employees should be called in the case of emergency or a trouble situation by the dispatchers." (ROA.1141.) Mr. Scott similarly testified to this absence of instructions or guidelines:

> Q: And if a field employee is out there and they're all on call and the dispatcher – how does the dispatcher – are there any guidelines that the dispatcher can use to reassign this person from one schedule –

[41] Petitioner's Brief, at p. 25.

from one duty location to another duty location if another call comes in?

A: No. It's his judgment.

(ROA.2825.) The Dispatcher must "draw on his technical expertise and experience" in assigning field employees to locations, as opposed to following written directions. (ROA.2826.)

Similarly, when describing a multiple outage situation where a Dispatcher decided to prioritize power to residential customers before a chemical plant, Mr. Fabre emphasized the absence of any documents or guidelines used by the Dispatcher in making his decision:

Q: Okay. But surely there must have been a manual somewhere that told him it was okay to do that?

A: No. There's no manual that tells you how to do it. What—our manuals tell what any utility company manuals tell you is for a one-contingency outage. Okay. There is no—

Q: That was a decision [Dispatchers] had to make using what?

A: [Dispatchers] had to use their knowledge and experience.

* * *

Q: All right. No manual told your dispatchers how to handle that situation.

A: There is no manual for that.

(ROA.2930-31.)

Finally, the record evidence also contradicts the Union's argument that Dispatchers do not have the authority to move field employees and that employees' assignments are contingent upon their own availability and cooperation.[42] The record firmly establishes, to the contrary, that field employees *must* report to whatever location they are assigned or reassigned by the Dispatcher, even if it is out of their network or normally assigned area. (ROA.484-85, 3022-3023.) The Union's business manager even admitted that Dispatchers "ha[ve] authority to redirect that person to another case of trouble." (ROA.1131.) The inverse is also true as Dispatchers have the authority to permit field employees to leave a location where they would otherwise be required to stay. (ROA.1133.)

Thus, a review of the entire record firmly evidences that Dispatchers exercise "independent judgment" and consider innumerable discretionary factors when assigning employees to places in multiple outage situations.[43] The Union's brief notably ignores this record evidence. Instead, the Union argues that the Board has made "the same error" as in *Entergy I* by "ignoring" the (distinguishable) testimony cited by the Union.[44] EMI disagrees. The Board in *Entergy I* ignored all of the

[42] Petitioner's Brief, at p. 25.

[43] This is exactly the type of evidence that the First Circuit noted is needed to establish that electrical-utility dispatchers use "independent judgment" when assigning employees to locations. *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 14 n.13 (1st Cir. 2015).

[44] Petitioner's Brief, at p. 27. For example, while the Union quotes testimony

record evidence related to simultaneous or multiple outage situations and, instead, focused only on the "simple" example involving a single outage.[45] (ROA.4878.) Ignoring record evidence on an entire subject-matter (*i.e.*, multiple outage situations) is very different than allegedly ignoring—or, more accurately, distinguishing—discrete testimony on a subject-matter considered in detail. Regardless, under the controlling standard of review, substantial evidence in the record supports the Board's finding that Dispatchers exercise "independent judgment" when assigning field employees to locations in multiple outage situations. *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 523 (1981) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.") (quoting *Consolo v. FMC*, 383 U.S. 607, 620 (1966); *NLRB v. Atl. Paratrans of N.Y.C., Inc.*, 300 F. App'x 54, 55 (2d Cir. 2008) ("Supervisory status under the Act is a question of fact. In this context, reversal based on a factual question is warranted only if, based on the record as a whole, no rational trier of fact could reach the conclusion drawn by the Board. Accordingly, this Court may not displace the Board's choice between two fairly

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alleging that Dispatchers are simply taught to start with the largest outages and work down, that is only "one thing" that Dispatchers consider amongst other factors such as the types of customers at issue, the "volume" of the trouble, and whether more field employees are needed because the situation is "too great." (ROA.1409-1410.)

[45] Even in the "simple" examples involving a single trouble situation, a Dispatcher still makes numerous judgments. (ROA.789-829, 1128-36.)

conflicting views, even though [it] would justifiably have made a different choice had the matter been before [it] *de novo*.") (internal quotation marks and citations omitted).

B. The Board did not err in finding that Dispatchers exercise "independent judgment" when assigning employees to places regardless of whether such decisions require the assessment of field employees' skills.

In its second argument regarding "independent judgment," the Union contends that the Board erred in finding that Dispatchers exercise "independent judgment" because the Board ignored evidence that Dispatchers do not assess the individual skills of field employees when exercising such judgment. However, the Board did not "ignore" such evidence. Rather, the Board squarely confronted this evidence (previously raised by the Union) and held that Dispatchers are supervisors "even absent individual skill assessment, based on their utilization of a high level of independent judgment in assigning field employees to a place to perform repairs." *Entergy Miss., Inc.*, 367 N.L.R.B. No. 109 at *15-16. The Union disagrees and argues that supervisors cannot exercise "independent judgment . . . without any consideration of individual skill sets."[46] Thus, the crux of the Union's argument is that the Board erred by failing to interpret "independent judgment" to necessarily

[46] Petitioner's Brief, at p. 29.

include a sub-requirement that a decision-maker assess the individual skills of employees that he or she assigns.

As a preliminary matter, the Court should not review this issue *de novo* as argued by the Union.[47] Indeed, the Board's statutory interpretation is entitled to *Chevron* deference as already recognized by the Court in its *Entergy II* opinion. 810 F.3d at 292. Both the Supreme Court and this Court have previously noted that "independent judgment" under Section 2(11) is an ambiguous term. *See Kentucky River* 121 S. Ct. at 1867; *Entergy II*, 810 F.3d at 293. Under *Chevron*, the Board's interpretation of an ambiguous provision of the NLRA is entitled to deference, and "any interpretation that is reasonably defensible" must be upheld. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984); *see also Entergy II*, 810 F.3d at 292 ("We accord *Chevron* deference to the Board's reasonable interpretations of ambiguous provisions in the NLRA."). Therefore, this Court should consider only whether the

[47] Petitioner's Brief, at p. 29-30 & n.3. To the extent the Union's argument implicates the Board's factual finding that Dispatchers are supervisors, the *Entergy II* Court has already held that "[w]hether an employee is a supervisor is a question of fact" and that the Board's findings on this issue must be affirmed if "reasonable and supported by substantial evidence on the record considered as a whole." 810 F.3d at 292. The lone case cited by the Union, *Hallmark-Phoenix 3, L.L.C. v. NLRB*, 820 F.3d 696, 712 n.8 (5th Cir. 2016), did not involve similar issues of supervisory status and, instead, applied a *de novo* standard of review to the Board's legal interpretation of a term in a collective bargaining agreement. In applying the *de novo* standard of review, that court noted that "[c]ollective bargaining agreements are interpreted according to ordinary principles of contract law." *Id*. at 705 (internal quotations and citations omitted).

Board's construction "is based on a permissible construction of the statute" and, in doing so, may evaluate "only whether the decision is *arbitrary, capricious, or manifestly contrary to the statute*, and may not substitute [its] own judgment for a reasonable alternative formulated by the [Board]." *Carias v. Holder*, 697 F.3d 257, 263 (5th Cir. 2012) (internal quotations omitted) (emphasis added).

The Board's interpretation of "independent judgment" should be upheld because it was not arbitrary, capricious, or manifestly contrary to the statute. First, the plain language of the statute does not support the Union's narrow interpretation that "independent judgment" must include an individualized assessment of employees' skills. Section 2(11) merely states that supervisors must exercise their authority in a manner that "is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152 (2019) (11). There is nothing in the statute to suggest that supervisors must assess the individual skills of subordinate employees in order to qualify as exercising independent judgment. Moreover, when construing the meaning of "independent judgment," neither the Board nor this Court have required, or even suggested, such a narrow interpretation:

> In *Oakwood* . . . [t]he Board interpreted "independent judgment" to refer to an individual "act[ing], or effectively recommend[ing] action, free of the control of others and form[ing] an opinion or evaluation by discerning and comparing data." [348 N.L.R.B.] at 692-93. The Board further explained that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement." *Id*. at 693. "On the

> other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." *Id*. The Board also reasoned that "[t]he authority to effect an assignment, for example, must be independent, it must involve a judgment, and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" *Id*.

Entergy II, 810 F.3d at 296. This is the controlling standard articulated by the Board and the Fifth Circuit, and it does not require "assessment of employees' skill" as a necessary pre-requisite to, or sub-requirement of, "independent judgment." Indeed, such a statutory interpretation would be impractically narrow as the term "independent judgment" is purposefully ambiguous so that the Board can apply it across an array of contexts. *Alois Box Co. v. NLRB*, 216 F.3d 69, 73 (D.C. Cir. 2000) ("Necessarily an ambiguous term in contrast to authority of a 'routine or clerical nature,' the Board is to be given room to apply the term 'independent judgment.'"); *NLRB v. Hilliard Dev. Corp*., 187 F.3d 133, 142 (1st Cir. 1999) ("[P]hrases in § 2(11) such as 'independent judgment' and 'responsibly to direct' are ambiguous, so the Board needs to be given ample room to apply them to different categories of employees[.]") (internal quotations and citations omitted).

EMI certainly does not dispute that "independent judgment" *could* be evidenced, in whole or in part, by a decision-maker's assessment of employees' skills. This most commonly arises in the healthcare context where varying medical specialties and skills may be matched to specific medical conditions, as recognized by the Board:

> *In the healthcare context*, the Board has held that assignment encompasses the responsibility to assign employees to care for particular patients. *See Oakwood Healthcare*, *supra*, at 689. The Board has also commented that, *in this setting*, independent judgment is probably involved if a putative supervisor weighs the "individualized condition and needs of a patient against the skills or special training of available nursing personnel," and has found that putative supervisors exercised independent judgment by matching a "nurse's skill set and level of proficiency at performing certain tasks . . . [to the] needs of a particular patient." *Id*. at 693, 695.

Arc of S. Norfolk, 368 N.L.R.B. No. 32, at *11-12 (July 31, 2019) (emphasis added). Indeed, all but three of the decisions cited by the Union[48] are specific to the context of healthcare, or more accurately nursing.[49] And the three non-healthcare decisions simply deferred to the Board's findings that employees who acted "as a conduit" to relay pre-made decisions, who relied on pre-drafted schedules to make assignments and/or who relied on "mechanical" standards to make assignments, did not exercise "independent judgment."[50]

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[48] Petitioner's Brief, at p. 29 n.2 and 31.

[49] *Thyme Holdings, LLC v. NLRB*, No. 17-1191, 2018 U.S. App. LEXIS 13936 (D.C. Cir. May 22, 2018) (licensed vocational nurses); *NLRB v. Sub Acute Rehab. Ctr. at Kearny, LLC*, 675 F. App'x 173 (3d Cir. 2017) (licensed practical nurses); *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298 (6th Cir. 2012) (charge nurses); *Lakeland Health Care Assocs., LLC v. NLRB*, 696 F.3d 1332 (11th Cir. 2012) (licensed practical nurses); *Oakwood*, 348 NLRB at 686 (charge nurses).

[50] *NLRB v. Atl. Paratrans of N.Y.C., Inc.*, 300 F. App'x 54, 55 (2d Cir. 2008) (deferring to Board finding where "it is uncontroverted that the large majority of routes and trips are preassigned by parties other than the dispatchers" and "factors that the dispatcher considers to determine who will receive the additional trips are largely mechanical and geographical"); *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1265 (11th Cir. 1999) (deferring to Board finding where docking pilots

In sum, the Union seemingly asks this Court to be the first-and-only authority to interpret "independent judgment" to necessarily include a sub-requirement that a decision-maker, across all contexts, must assess the individual skills of employees. Across a variety of contexts, both courts and the Board have found "independent judgment" without requiring that employees' skills be assessed.[51] Accordingly, the Union's argument should be rejected.

IV. Alternatively, there is substantial evidence in the record that Dispatchers "assign" field employees to a "place."

EMI maintains that the only issue properly before this Court is whether Dispatchers exercise "independent judgment" when assigning field employees to a

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assigned employees based "only on the schedule provided by [the employer] and the power of the tugs in relation to the dimension of the ship to be docked"); *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1279 (5th Cir 1986) (deferring to Board finding that employees who serve as "a conduit for those decisions already made by the coverage manager" do not exercise independent judgment). And regardless, these cases are insufficient to overcome *Chevron* deference. *NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 787 (1990) ("[A] Board rule is entitled to deference even if it represents a departure from the Board's prior policy.").

[51] *Creative Vision Res., LLC*, 364 NLRB No. 91, at *6, *122-23 (Aug. 26, 2016); *Squires Lumber Co.*, 2016 N.L.R.B. LEXIS 375 (May 24, 2016) (unpublished), *adopting* 2016 N.L.R.B. LEXIS 271, at *18 (Apr. 8, 2016); *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403, 411 (6th Cir. 2013); *PPG Aerospace Indus., Inc.*, 355 NLRB 103, 103 (2010); *Coastal Insulation Corp.*, 354 N.L.R.B. 495, 515-19 (2009); *Akal Sec. Inc.*, 354 N.L.R.B. 122, 132-36 (2009); *Metro Transp. LLC, d/b/a Metro. Transp. Servs., Inc.*, 351 N.L.R.B. 657, 660-61 (2007); *Beverly Health & Rehab. Servs., Inc. v. NLRB*, No. 98-5160, 1999 U.S. App. LEXIS 8395 at *9-12 (6th Cir. Apr. 28, 1999).

place. However, out of an abundance of caution, EMI will briefly address the Union's argument that Dispatchers do not "assign" field employees to a "place."

The only type of assignment in dispute is "assignment" to a "place."[52] Under controlling law, "assignment" to a "place" is satisfied when a supervisor has the authority to "designat[e] an employee to a place (such as a location, department, or wing)[.]" *Entergy II*, 810 F.3d at 296 (quoting *Oakwood*, 348 N.L.R.B. at 689). Indeed, the simple act of directing an employee to a location such as a work station, truck, or even a power outage is sufficient to establish "assignment" to a "place." *See, e.g., Creative Vision Res., LLC*, 2016 N.L.R.B. LEXIS 637, at *6 & 122-23 (Aug. 26, 2016) (a supervisor who directed hoppers to work on specific trucks sufficiently "assigned" employees to a place or location); *Squires Lumber Co*., 2016 N.L.R.B. LEXIS 375 (May 24, 2016) (unpublished), *adopting* 2016 N.L.R.B. LEXIS 271, at *18 (Apr. 8, 2016) (a supervisor who directed employees to specific work stations sufficiently "assigned" employees to a place or location); *NSTAR Elec. Co*., 798 F.3d at 13-14 (assuming that routing of field employees to power outages was sufficient to "assign" employees to a place or location).

[52] Assignment may be established through assignment to a place (*i.e.*, a location, department, or wing), assignment to a time (*i.e*., a shift, overtime), *or* assignment of significant overall duties (*i.e*., tasks). *See Entergy II*, 810 F.3d at 296. The *Entergy II* Court disposed of all arguments and evidence regarding assignment to a "time" and assignment of "significant overall duties." *Id*. at 298.

The Union's brief attempts to conflate different types of "assignment" that are immaterial to the present dispute. For instance, the Union emphasizes that the *Entergy II* Court determined that Dispatchers cannot require field employees to remain at work.[53] But these facts are specific to "assignment" to a "time," and this factor has no relevance when separately analyzing "assignment" to a "place." 810 F.3d at 298. Indeed, the case law cited by the Union focuses almost exclusively on assignment to a "time" (*i.e.*, a shift, overtime) and/or assignment of "significant overall duties" (*i.e.*, tasks). *See, e.g., UPS Ground Freight, Inc. v. NLRB*, 921 F.3d 251, 255 (D.C. Cir. 2019) (considering "assignment of work" (*i.e.*, tasks) with no specific allegation or analysis of assignment to a place); *Mars Home for Youth v. NLRB*, 666 F.3d 850 (3d Cir. 2011) (considering assignment of significant overall duties, with no specific allegation or analysis of assignment to a place). Likewise, the record evidence cited by the Union again focuses on assignment to a "time" and/or assignment of "significant overall duties." *See, e.g.*, ROA.4043 ("[T]he dispatcher can request that the employee work overtime, but the dispatchers have no authority to require the employees to remain at work."); ROA.1516 (Dispatchers cannot order field employees to work overtime); ROA.1411-12 (Dispatchers do not have "the authority to force [a field employee] to stay").

[53] Petitioner's Brief, at p. 23.

Here, when focusing on the type of assignment actually before this Court on this appeal, overwhelming evidence establishes that Dispatchers designate field employees to locations, or "assign" them to "place." *This issue was not even contested by the parties during the Entergy II appeal*.[54] In its opinion in *Entergy II*, this Court repeatedly referenced Dispatchers' ability to designate or send field employees to various places or locations. For instance, the Court observed that "[a]fter a dispatcher has sent a field employee to one location, he has authority to redirect that person to another case of trouble." 810 F.3d at 297 (internal quotations omitted). Similarly, the Court noted that "at times, a dispatcher may have to decide whether to send his one crew to a trouble location with the most customers on it, to the one that's got the hospital out, or to the plastics plant that needs to be picked up." *Id*. (internal quotations omitted). The Board did the same on remand, identifying Dispatchers' unfettered authority to send field employees to trouble spots, locations, and outages. *Entergy Miss., Inc*., 367 N.L.R.B. No. 109 at *6-9.

Indeed, the record is replete with evidence that Dispatchers have the authority to send field employees to innumerable locations, even if a location is outside a field employee's network or normally assigned area. For example, when a trouble situation arises, a Dispatcher determines the geographical location of the problem and assigns or sends one or more field employees to that location. (ROA.789-803,

[54] *See supra*, Section II(B), pp. 19-27.

1830, 2789-90, 3013.) Thereafter, the Dispatcher has the authority to continue to assign a field employee to other locations. (ROA.2794-95, 3014-15.) The Union's business manager was explicit that after a Dispatcher has sent a Field Employee to one location, he "ha[s] authority to redirect that person to another case of trouble." (ROA.1131.) A Dispatcher may relocate a Field Employee who is already en route to a location by simply ordering the Field Employee: "don't go there[,] I want you to go handle this other situation." (ROA.1136.)

Although the Union argues that Dispatchers merely direct field employees to locations within their "pre-assigned" areas,[55] that is simply not true. Field employees are required to report to whatever location they are assigned or reassigned by the Dispatcher, even if it is outside their network or normally assigned region. (ROA.474-83.) The testimony of a former field employee made this explicit:

> Q. . . . Other power, other lights are going out; other trouble's popping up. What if that dispatcher needed you to go somewhere else? What could that dispatcher do with you?
>
> A. He could dispatch me to other places.
>
> * * *
>
> Q. Okay. And, again, what if that trouble—let's say that location—when you were a lineman, were you assigned to a network?
>
> A. Yes.

[55] Petitioner's Brief, at p. 20-21.

Q. What if that—this next area of trouble was outside of your network? Would the dispatcher have the authority to send you over there to that other network? Again, could you—if trouble sprung up in another network and a dispatcher needed you over in another network, would he have the authority to send you over there?

A. Yes.

Q. Okay. So who is the troubleman working under in these circumstances that we're talking about, under the control of?

A. The dispatcher.

Q. All right. And who ultimately has the authority, under these circumstances, to tell that dispatcher where to go?

A. The dispatcher?

Q. I'm sorry. To tell that troubleman or lineman where to go.

A. The dispatcher.

Q. Who maintains the authority over the troubleman or lineman in these circumstances?

A. Dispatcher.

Q. Who basically owns that asset, the troubleman or the lineman asset, in these circumstances?

A. Dispatcher.

Q. I use that term, own, own that asset. Is that an accurate description in your mind? You've been a lineman; you've been a troubleman. Is that an accurate description?

A. I would say yes.

ROA.3022-3023 (emphasis added). Accordingly, record evidence firmly establishes that Dispatchers designate field employees to locations, or "assign" them to "place."

CONCLUSION

The Board did not err in finding that Dispatchers at EMI are supervisors pursuant to Section 2(11) of the NLRA because they exercise "independent judgment" when assigning employees to locations. Accordingly, this Court should affirm the Board's order of March 21, 2019 and deny the Union's petition for review.[56]

Respectfully submitted,

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[56] Solely in the alternative, if the Court grants the Union's petition for review, the case should be remanded to the Board solely for the narrow purpose of determining whether Dispatchers assign employees to a location.

CERTIFICATE OF SERVICE

I certify on December 19, 2019, that a true and correct copy of this document was served via electronic means through transmission facilities from the Court upon those parties authorized to participate and access the Electronic Filing System for this Court in the above-captioned action:

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Dated: December 19, 2019